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**FOCAL COMMUNICATIONS CORPORATION )  
OF ILLINOIS )**

**Petition for Arbitration Pursuant to )  
Section 252(b) of the Telecommunications )  
Act of 1996 to Establish an Interconnection )  
Agreement with Illinois Bell Telephone )  
Company d/b/a Ameritech Illinois )**

**Docket No. 00-0027**

**FOCAL COMMUNICATIONS CORPORATION OF ILLINOIS'**

**REPLY TO BRIEFS ON EXCEPTION**

**TO THE**

**HEARING EXAMINERS' PROPOSED ARBITRATION DECISION**

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## INTRODUCTION

Focal Communications Corporation of Illinois ("Focal"), by its undersigned attorneys, files this Reply to the briefs on exception to the Hearing Examiners' Proposed Arbitration Decision dated April 3, 2000 ("HEPAD") filed by Ameritech Illinois ("Ameritech") and the Staff of the Illinois Commerce Commission ("Staff").

This arbitration ultimately involved only a couple of straight forward, but very important, issues, the most important of which the Hearing Examiners clearly and correctly analyzed: that the tandem rate of \$.005175 is the appropriate rate for reciprocal compensation for all traffic -- including Internet-bound traffic -- originated by Ameritech's local customers and transported and terminated by Focal (Issues 1 and 2) and that Ameritech should not be entitled to require Focal to add points of interconnection ("POIs") within 15 miles of rate centers in which it serves foreign exchange ("FX") customers (Issue 4). Ameritech takes exception to each of these conclusions, while Staff takes issue only with the conclusion regarding the reciprocal compensation rate for Internet-bound traffic.

Ameritech and Staff engage in total denial when they contend that the vacatur of the Federal Communication Commission's ("FCC's") decision in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98); *Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Proposed Rulemaking in Docket No. 99-68, 14 FCC Rcd. 3689 (1999) (the "*Declaratory Ruling*"), does not impact this Commission's determination whether reciprocal compensation should be paid on calls to the Internet. As will be discussed in detail below, from the outset of this case, both Ameritech and Staff relied exclusively on the FCC's *Declaratory Ruling* as the basis for their positions that Focal either should not be compensated at all (Ameritech's primary position) or vastly under-compensated (Staff's position and Ameritech's fall back position).

However, on March 24, 2000, that decision was vacated on appeal. *Bell Atlantic Tel. Companies v. FCC*, et al., No. 99-1094, 2000 WL 273383 (D.C. Cir. Mar. 24, 2000) ("*D.C. Circuit Decision*"). Ameritech's and Staff's positions are like houses built of cards, once a card is pulled from its foundation, the house must fall. The *D.C. Circuit Decision* is the card that was pulled, and Ameritech's and Staff's position that reciprocal compensation is not due on Internet-bound traffic has fallen flat since it lacks a legal foundation.

The HEPAD's conclusions on the issues addressed in Ameritech's and Staff's exceptions are supported by substantial evidence, are consistent with both this Commission's prior holdings and policy, as well as Federal law, and must be adopted by the Commission.

### **ARGUMENT**

#### **I. THE HEPAD REACHED THE CORRECT CONCLUSION ON ISSUE 2: RECIPROCAL COMPENSATION SHOULD BE PAID FOR TRAFFIC TERMINATING TO THE INTERNET.**

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##### **A. The *D.C. Circuit Decision* Eliminates any Legitimate Legal Basis for Ameritech's and Staff's Position that Focal is not Entitled to Reciprocal Compensation for Ameritech's Customers' Calls that Focal Delivers to an ISP.**

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Ameritech and Staff find themselves in a quandary. The one FCC decision which formed the legal basis for their position that Focal need not be paid reciprocal compensation when it delivers calls made by Ameritech's customers to the Internet was vacated.<sup>1</sup> The legal effect of that vacatur is that the FCC decision no longer exists. Staff responds by claiming that the vacatur is irrelevant, while Ameritech responds by seeking out new legal support for its position. Both of their efforts fail since the *D.C. Circuit Decision* eliminates any legitimate basis for their argument that Ameritech need not pay Focal reciprocal compensation for Internet-bound traffic.

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<sup>1</sup> While Staff has supported compensation being paid, the level of compensation it proposes is far below the rate of reciprocal compensation paid for all other local traffic.

1. **Ameritech's House of Cards.**

To understand Ameritech's legal dilemma created by the *D.C. Circuit Decision* – the decision upon which it has relied throughout this case has been vacated – one need only review Ameritech's filings in this case. In its Response to Focal's Petition for Arbitration, Ameritech argued in Section I.A. that Federal law prohibited the imposition of reciprocal compensation for ISP traffic. The *only* authority it cited for this proposition was the FCC's *Declaratory Ruling*. Later in its Response, Ameritech went on to argue that this Commission cannot entertain Issue 2 because "ISP traffic is interstate". (Ameritech Response, p. 5) Again, the *sole* authority Ameritech cited for this proposition is the *Declaratory Ruling*. In its discussion of the form of compensation that should be set, if any is going to be required, Ameritech urged the Commission to wait for the FCC to adopt rules on this issue, pursuant to the *Declaratory Ruling*. (Ameritech Response, pp. 7-8)

Ameritech's witnesses who addressed Issue 2 also relied almost exclusively on the *Declaratory Ruling* in support of their position for no compensation.<sup>2</sup> Ameritech witness Dr. Harris points only to the *Declaratory Ruling* in support of his position that Internet-bound traffic is not local. (See Amer. Ex. 1.0, p. 5) Mr. Panfil also relied solely on the *Declaratory Ruling* in claiming that Internet-bound traffic is local. (See Amer. Ex. 2.0, p. 19)

Now that the FCC's *Declaratory Ruling* has been vacated, Ameritech finds itself without *any* authority for the proposition it has long advanced. Rather than face the fact that there is no legal authority for its position that reciprocal compensation should not be paid on Internet-bound traffic, it instead relies on another FCC decision – the *Advanced Services Order* -- which Ameritech claims establishes that Internet-bound traffic is exchange access, not telephone

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<sup>2</sup> While Mr. Panfil subsequently proposed a rate for reciprocal compensation, the meager amount he recommended is tantamount to no payment at all.

exchange, service. (Amer. Except., p. 2 citing *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket 98-147 *et al.*, para. 16 (Dec. 23, 1999)(“*Advanced Services Order*”)) Ameritech attaches undue legal significance to the quoted portion of the *Advanced Services Order*.

First, the *Advanced Services Order* was released on December 23, 1999, many months after the *Declaratory Ruling* had been issued. Second, the portion of the *Advanced Services Order* relied upon by Ameritech was taken out of context. The portion of paragraph 16 which precedes the quoted language states as follows:

The Commission traditionally has determined the nature of communications by looking to the end points of the communication, and has consistently rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers. With respect to xDSL-based advanced services used to connect Internet Service Providers (ISPs) with their dial-in subscribers, the Commission *has determined* that such traffic does not terminate at the ISP's local server, but instead terminates at Internet websites that are often located in other exchanges, states or even foreign countries. Consistent with this determination, . . . (emphasis added)

The previous determination to which the FCC refers is obviously the *Declaratory Ruling*. Thus, the portion of the *Advanced Services Order* upon which Ameritech relies and which it quoted in its brief was referring to the FCC's conclusion in the *Declaratory Ruling*. That fact is made even more clear by the dissenting opinion of FCC Commissioner Furchtgott-Roth, which states:

Because communication with an advanced service such as xDSL is with and through an ISP, I find it difficult to classify such services as either telephone exchange service or access service. First, as I explained in the reciprocal compensation order, I believe that traffic to an ISP, whether dial-up traffic or provided through an advance service, terminates at the ISP. The so-called "two-call theory" was properly advanced by the Commission before January of this year and then improperly abandoned to provide a short-term remedy to reciprocal compensation issues. As I view local exchange traffic as terminating at an ISP, I consequently cannot view traffic subsequently routed by an ISP as part of a single call, or part of a telephone exchange service.

Indeed, had there been some other FCC prior decision to which the FCC was referring in the *Advanced Services Order* in support of the statement Ameritech quotes in its brief, Ameritech would certainly have also cited that decision as well. There is none. Thus, Ameritech's sole legal authority for its discussion on pages 1 through 4 of its brief on exceptions is the *Advanced Services Order*, the cited portion of which clearly relied upon the *Declaratory Ruling*, and the *Declaratory Ruling*, which was vacated by the *D.C. Circuit Decision*.

Moreover, the *Advanced Services Order* did not determine, and was not issued for the purpose of addressing, the question before the Commission in this case: whether reciprocal compensation should be paid on ISP-bound traffic. Thus, the discussion to which Ameritech refers is dicta. Moreover, to the extent the discussion relied upon conclusions stated by the FCC in a now vacated decision – which is the case here – that discussion is no more the “controlling law” (as Ameritech contends at pages 2, 17) than is the vacated decision. Ameritech's reliance on the *Advanced Services Order* reflects its desperation at no longer having a legal basis for its position.

In any event, the Commission should not rely upon dicta in determining whether Internet traffic is local traffic for purposes of reciprocal compensation. Instead, it should rely upon the manner in which that traffic has been treated for regulatory purposes. According to the FCC's prior determinations, ISPs are not telecommunications carriers and do not pay access charges. Instead, they purchase telecommunications services from telecommunications carriers and pay basic business rates. The FCC has treated ISPs as users of telecommunications services for all purposes. See *D.C. Circuit Decision*, pp. 6-8. The *D.C. Circuit Decision* noted that while the FCC has exempted Internet-bound calls from access charges, that exemption “rested it on an acknowledgement of the real difference between long-distance calls and calls to information



service providers.” *Id.*, p. 7. Ameritech is asking the Commission to create an exception to that principle, one that lacks any legal basis. Its position must be rejected.

Finally, Ameritech references *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378, 119 S.Ct. 721, 730 (1999), for the legal proposition that this Commission has no jurisdiction over local competition. (Amer. Except., p. 3) Ameritech has again misstated the law. In fact, the Supreme Court upheld the FCC’s conclusion in *In the Matter of Implementation of the Local Competition Provisions in Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16015 ¶ 83 (1996) (“*Local Competition Order*”), that the 1996 Act gives state commissions the authority to regulate local competition. *AT&T Corp.* at 379. Thus, this Commission clearly has authority over the issue at hand.

## **2. Staff’s House of Cards.**

Staff’s position on the impact of the *D.C. Circuit Decision* is woefully inadequate as a matter of law and policy.

In explaining how reciprocal compensation for Internet-bound traffic became an issue in this case, Staff witness Phipps pointed to the FCC’s *Declaratory Ruling*. (Staff Ex. 2.0, pp. 5-7) Mr. Phipps stated that the FCC has distinguished Internet-bound traffic from all other local traffic.<sup>3</sup> (Staff Ex. 2.0, pp. 7-10) He mentioned no other legal authority for his position. (Staff Ex. 2.0, pp. 5-7) Thus, Staff’s position on the reciprocal compensation rate for Internet-bound traffic flowed solely and exclusively from the *Declaratory Ruling*.

Staff contends that the *D.C. Circuit Decision* did not “repudiate the FCC’s conclusion that Internet-bound traffic was jurisdictionally interstate, rather it merely called into question the

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<sup>3</sup> Mr. Phipps also noted that the *Declaratory Ruling* made clear that this Commission has the authority to address reciprocal compensation for ISP-bound traffic “until and unless” the FCC rules otherwise. (Staff Ex. 2.0, p. 7)

propriety of the analytical tool (end-to-end analysis of the call) that the FCC used to make the determination.” (Staff Except., p. 5) Staff’s statement wholly ignores the legal impact of the *D.C. Circuit Decision*, which is that it removes the *Declaratory Ruling* as authority for Staff’s proposition that ISP-bound traffic is not local. Staff is incorrect in its suggestion that the *Declaratory Ruling’s* analysis somehow stands or was somehow ratified by the *D.C. Circuit Decision*. That is not the legal consequence of the *vacatur* of an order.

Staff goes on state that “prior to the D.C. Circuit opinion, such a call to an ISP was categorically not a local call and was not subject to state commission jurisdiction and not subject to reciprocal compensation.” (Staff Except., p. 6) This statement is obviously meant to mean that such calls were interstate by virtue of the *Declaratory Ruling*. Since the *D.C. Circuit Decision* vacated the *Declaratory Ruling*, the statement is meaningless. If by its statement Staff intended to claim that it was previously generally understood that Internet-bound calls were not local, then Staff’s statement is in total disregard of this Commission’s prior determination to the contrary in *Teleport Communications Group Inc., et al.*, Docket Nos. 97-0404, 97-0519 and 97-0525 (cons.) (March 11, 1998), p. 11, *aff’d* 179 F.3d 566 (7th Cir. 1999) (“*Consolidated ISP Case*”) (a copy of which is attached hereto as Attachment A). It is surprising to say the least that the Commission’s Staff would repudiate the Commission’s prior determination.

Finally, Staff claims that it is “quite possible” that Internet-bound calls will not be subject to reciprocal compensation “after the remand.” (Staff Except., p. 6) This statement is akin to Ameritech’s reference to certain statements made by an FCC employee regarding how the FCC will rule on remand. (Amer. Except., p. 3, fn. 1) Neither Staff’s nor Ameritech’s contentions have any legal significance. The FCC has not acted until it has issued another order. Only at

that time will the Commission know what the FCC's position will be. Speculation is legally insignificant.

**B. The D.C. Circuit Decision Confirms This Commission's Previous Determination That Internet-Bound Traffic Should be Treated No Differently Than all Other Local Traffic for Purposes of Reciprocal Compensation.**

For several years, Ameritech has urged this Commission to rule that Ameritech does not have to compensate CLECs for delivering Internet-bound traffic that is originated by Ameritech's end-users. The Commission previously rejected that argument and found that "[t]here is no legal basis for treating ISP traffic differently than the traffic of any other similarly-situated end users for purposes of reciprocal compensation." *Consolidated ISP Case*, p. 11. The recent vacatur of the FCC's *Declaratory Ruling* by the D.C. Circuit Court, and the court's analysis and criticisms of that decision, make it clearer than ever that this Commission was correct when it previously concluded that ISP-bound traffic is local traffic subject to the same reciprocal compensation obligations as all other local traffic, including the requirement that compensation be determined on the basis of the incumbent local exchange carrier's ("ILEC's") total element long-run incremental cost ("TELRIC").

The D.C. Court determined that the FCC erred when it failed to provide an adequate explanation of why the end-to-end analysis that it used to determine the *jurisdictional* nature of ISP traffic as interstate is relevant to the question of whether ISP-bound traffic is local for purposes of compensation under §251(b)(5) of the 1996 Act. Indeed, the court went so far as to indicate that this analysis is incorrect and that the conclusions derived from that analysis are also incorrect. The Court criticized the logic of the FCC's analysis when it stated:

There is no dispute that the Commission has historically been justified in relying on this method [the end-to-end analysis] when determining whether a particular communication is jurisdictionally

interstate. But it has yet to provide an explanation why this inquiry is *relevant* to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.

*D.C. Circuit Decision*, p. 5 (emphasis added).

The Court went on to suggest the appropriate analysis when it noted that the FCC should have considered how local traffic should be defined. The CLECs and intervenors argued that the FCC's regulations and decisions define local traffic in a manner that includes ISP-bound calls. *Id.* at 5. Under 47 CFR §51.701(b)(1), telecommunications traffic is defined as local if it "originates and terminates within a local service area." The FCC defines "termination" as "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." *In the Matter of Implementation of the Local Competition Provisions in Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16015 ¶1040 (1996) ("*Local Competition Order*"). As the Court noted:

Calls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the "called party."

*D.C. Circuit Decision*, p. 5. The Court indicated that the FCC conveniently avoided reaching the inevitable conclusion that ISP-bound calls qualify as local traffic by analyzing the communication on an end-to-end basis. *Id.* It also noted that the cases cited by the FCC to support its analysis were distinguishable and not supportive. Absent some further rationale, the D.C. Circuit concluded that ISP-bound traffic falls within §251(b)(5) of the Act. *Id.*

As further grounds for vacating the decision, the D.C. Circuit Court noted that, while conceding on appeal that under the Act traffic is either "exchange access" or "exchange service," the FCC failed to provide an adequate explanation why ISP traffic is "exchange access" rather

than "exchange service." *Id.* at 8. Indeed, the Court appeared persuaded by the argument that calls to ISPs do not fit within the statutory definition of "exchange access" because ISPs do not connect to the network for the purpose of originating or terminating telephone toll services, but rather do so for the purpose of providing information services. *Id.*

The Court's analysis refutes Staff's claim that "the D.C. Circuit has concluded that these calls are distinguishable from local calling." (Staff Excerpt., p. 6) All in all, the *D.C. Circuit* Decision leads to but one conclusion – ISP-bound traffic qualifies as local traffic because the traffic "terminates" at the ISP and it fits "within the local call model of two collaborating LECs, [instead of] the long distance model of a long distance carrier collaborating with two LECs." *D.C. Circuit Decision*, p. 5; *Local Competition Order*, para. 1034. This conclusion is consistent with this Commission's pre-*Declaratory Ruling* decision in which it concluded that ISP traffic is not analogous to interexchange traffic, ISPs are end users of telecommunication services, and local calls to ISPs are separate and distinct from the information services provided by ISPs over the packet-switched network. *Consolidated ISP Case*, pp. 11-13. More importantly for purposes of this proceeding, the Court's analysis absolutely confirms the accuracy of the HEPAD's holding that "a call to an ISP is a call from one local usage customer to another local usage customer, in other words, a call utilizing telephone exchange service, subject to state commission jurisdiction and the payment of reciprocal compensation to the terminating carrier under Section 251(b)(5) of the Act." HEPAD at 11.

**C. Every Federal Court that has Considered the Issue of the Treatment of ISP-Bound Traffic has Upheld the Finding That ISP-bound Traffic is Subject to Reciprocal Compensation.**

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Separate and apart from the *D.C. Circuit Decision*, there is overwhelming support nationwide for the HEPAD's determination that ISP-bound traffic must be treated like all other local traffic for reciprocal compensation purposes. Each of the ten federal courts, including three United States Courts of Appeal, that have reviewed the decisions of various state commissions on the merits, have refused to overturn state commission determinations that ISP-bound traffic must be treated as local traffic for purposes of reciprocal compensation. Decisions have been rendered in the United States Courts of Appeal for the Seventh, Ninth and Fifth Circuits, and District Courts in Washington, Texas, Illinois, Oregon, Michigan, Alabama and Oklahoma.<sup>4</sup>

Most recently, the Fifth Circuit considered the Texas Commission's determination that reciprocal compensation applies to ISP-bound traffic. It concluded that the Texas Commission's decision did not conflict with the 1996 Act or any FCC rule. *See Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 2000 WL 332062 at 7 (5<sup>th</sup> Cir. March 30, 2000). The Fifth Circuit refused to overturn the Texas Commission's finding that Internet service involves multiple components, a telecommunications service component and an information service component. Further, the Fifth Circuit found the lower court's "conclusion that modem calls

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<sup>4</sup>See *Illinois Bell Tel. Co. d/b/a Ameritech Illinois v. WorldCom Technologies, Inc., et al.*, 179 F.3d 566 (7<sup>th</sup> Cir. 1999), affirming *Illinois Bell Tel. Co. v. WorldCom Technologies*, No. 98 C 1925, 1998 WL 419493 (N.D. Ill. July 23, 1998); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9<sup>th</sup> Cir. 1999); *Southwestern Bell Tel. Co., v. Public Utility Comm'n of Texas, et al.*, No. 98-50787, 2000 WL 332062 (5<sup>th</sup> Cir. March 30, 2000) affirming *Southwestern Bell Tel. Co. v. Public Utility Comm'n*, No. MO-98-CA-43, 1998 U.S. Dist. LEXIS 12938 (W.D. Tex. June 16, 1998); *GTE Northwest, Inc. v. WorldCom, Inc.*, No. 99-912C, Minute Order (W.D. Wash. June 11, 1999); *Southwestern Bell Tel. Co. v. Brooks fiber Communications*, No. 98-CV-468-K(J), Order (N.D. Okla. Oct. 1, 1999); *Michigan Bell Tel. Co. v. MFS Intelenet*, No. 5:98 CV 18, 1999 U.S. Dist. LEXIS 12093 (W.D. Mich. Aug. 2, 1999); *Bell South Telecommunications, Inc. v. ITC DeltaCom Communications, Inc.*, 62 F.Supp. 2d 1302, (M.D. Ala. Nov. 15, 1999) aff'd on recon. (M.D. Ala. Nov. 15, 1999); *U.S. West Communications, Inc. v. WorldCom Technologies, Inc., et al.*, 31 F.Supp.2d. 819 (D. Or. Dec. 10, 1998).

terminate locally for purposes of compensation is both well-reasoned and supported by substantial evidence.” *Id.* at 11. Like the D.C. Circuit, the Fifth Circuit found support in the FCC’s own rules:

A 1996 FCC Report defined “termination,” for purposes of section 251(b)(5), as “the switching of traffic that is subject to section 251(b)(5) at the terminating carrier’s end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party’s premises.” (citation omitted). As for the modem calls here at issue, the ISPs are Time Warner’s customers, making Time Warner the terminating carrier. So, under the foregoing definition, “termination” occurs when Time Warner switches the call at its facility and delivers the call to the “called party’s premises,” which is the ISP’s local facility. Under this usage, the call indeed “terminates” at the ISP’s premises.

*Id.* at 9.

Thus, the weight of authority clearly supports the HEPAD’s conclusion that ISP-bound traffic must be treated as all other local traffic and is subject to reciprocal compensation.

**D. The D.C. Circuit Decision Obviates the Need to Consider the Other ISP Reciprocal Compensation Issues Raised by Ameritech and Staff.**

Because the D.C. Circuit decision leads to the unmistakable conclusion that ISP-bound traffic is local, the FCC’s regulations entitle Focal to use Ameritech’s costs as a proxy for Focal’s costs for purposes of determining the appropriate rate for reciprocal compensation. 47 CFR 51.711. Since ISP traffic is legally entitled to the same treatment as other local traffic, the FCC’s rules already identify the applicable symmetrical rate elements and compensation methodology necessary to determine the appropriate compensation. 47 CFR §51.711(a). Accordingly, the HEPAD reached the correct conclusion that the same reciprocal compensation rate should apply to ISP bound traffic and all other local traffic.

Relying upon paragraph 1093 from the *Local Competition Order*, Ameritech contends that “Focal did not carry its burden to prove its costs.” (Amer. Except., p. 23) Specifically,

Ameritech stated "And the FCC has ruled that when a competing carrier cannot use the incumbent's costs as a proxy for its own, the carrier 'must prove to the state commission the costs of terminating local calls.'" (Amer. Except., p. 23) Ameritech has failed to disclose that in the preceding paragraph the FCC had concluded "We believe, with respect to interconnection between LECs and paging providers, that there should be an exception to our rule that states must establish presumptive symmetrical rates based on the incumbent LEC's costs for transport and termination of traffic." By only quoting a portion of the paragraph, Ameritech has failed to disclose that the FCC has excluded only paging and PCS licensees from the reciprocal compensation rule, and required *only* those carriers to establish rates based on forward-looking costs rather than ILEC costs. 47 C.F.R. 51.711 (c). There is no support for Ameritech's claim that Focal, which is not a pager or PCS company, could not rely upon Ameritech's costs, but had a burden to prove its own costs. Ameritech's highly misleading argument should be disregarded by the Commission.

**1. Ameritech's Policy Arguments Were Refuted by the Overwhelming Evidence.**

As explained above, there is no need to consider the policy implications of each compensation arrangement proposed in the record, as Ameritech asks the Commission to do (Amer. Except., pp. 11-16), since the appropriate compensation arrangement is already established by federal law.

While Ameritech raises little if anything that is new on these issues, certain red herrings it has laid out at pages 11 through 16 bear noting:

- ⇒ The access charge order recently issued by the Commission in Docket Nos. 97-0601 and 97-0602 (cons.) is irrelevant to the determination in this case concerning the appropriate level of reciprocal compensation.



- ⇒ If the Commission is going to consider the increase in the volume of ISP traffic in determining the rate to be paid for reciprocal compensation, it must also consider that the growth in Internet usage has led to Ameritech reaping substantial financial benefits associated with increased second line growth and other Internet-related revenue sources that have added to its record profitability. (Focal Ex. 2.0, p. 16) According to Ameritech's 1998 10K Report:

The proliferation of fax machines, Internet usage and computer communications resulted in data traffic exceeding voice traffic for the first time in our history. Demand for additional lines and call management services subscribed to on a monthly basis, such as Call Waiting and Caller ID, increased by 17% in 1998. . . . Local service revenues increased by \$397 million, or 6.4%, in 1997 due largely to increased sales of call management services. These increases resulted from growth in both the number of features in service and the number of pay-per-use activations of call management services. Access line growth, driven in part by increased demand for second lines by residential and small business customers, also contributed to the revenue increase. (*Id.*, p. 39)

In its First Report and Order in CC Docket No. 96-262, para. 346 ("*Access Charge Reform Order*"), released May 16, 1997, the FCC confirmed this revenue source, when it stated:

Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services.

- ⇒ The HEPAD's conclusion regarding reciprocal compensation for ISP-bound traffic would not provide a subsidy to Focal. Rather, by terminating traffic on Focal's network, Ameritech causes Focal to incur costs. If Ameritech's position is adopted, Focal will be required to accommodate the growing level of ISP-bound traffic originating on the Ameritech network as a result of Ameritech's growing Internet-using customer base, for free. In essence, while Ameritech would be allowed to continue reaping substantial financial benefits associated with increased second line growth and other Internet-related revenue that have added to its record profitability, Focal would be left with an enormous level of unrecoverable expense. (Focal Ex. 2.0, p. 16)
- ⇒ Rather than lead to inefficiency in the market, adoption of the HEPAD would lead to a more robust, competitive market. ISPs are an important market segment for CLECs. Eliminating a CLEC's ability to recover its costs associated with serving ISPs is likely to distort one of the only local exchange market segments that appears

to be well on its way toward effective competition. ISPs have been drawn to CLECs like Focal because these CLECs, unlike incumbent carriers such as Ameritech, have been willing to meet their unique service needs. Allowing ILECs to direct calls to the ISPs by using the CLEC network without compensating them for its use, penalizes the CLEC for attracting customers via innovative and customer service focused products.<sup>5</sup> (Focal Ex. 2.0, p. 20, 23-24)

- ⇒ Allowing Ameritech to skirt its obligation to pay for the use of an interconnecting carrier's network for purposes of carrying its local customers' calls to ISPs will skew the supply substitutability of ISP services versus other local services, thereby making other local exchange services more attractive production alternatives. This will raise ISP prices in relation to other local exchange services thereby impairing the ISPs' ability to receive services at rates comparable to other local end-users. This will suppress ISP communication demand versus other types of non-ISP communication. This price discrimination effect will mean electronic communication and commerce demand will undoubtedly grow at a slower pace than if there were no discrimination. Any difference between the unrestricted growth of electronic communication and the suppressed growth caused by such uneconomic price discrimination would result in a net welfare loss due to the inefficient market consequences of Ameritech's failure to pay inter-carrier compensation for ISP-bound traffic. (Focal Ex. 2.0, pp. 28-29)
- ⇒ Consumers will benefit from these emerging technologies only if the HEPAD is adopted. Despite Ameritech's arguments, the simple fact remains that calls directed to ISPs are functionally identical to local voice calls for which Ameritech agrees to pay termination charges. Applying different termination rates or, even worse, compensating a carrier for one type of call and not for the other, will generate inaccurate economic signals in the marketplace, the result of which will drive firms away from serving ISPs. This result could have a dire impact on the growing electronic communications and commerce markets. (Focal Ex. 2.0, p. 20)

## **2. Ameritech's "Holding Time" Argument Was Properly Rejected; Ameritech Offers no New Arguments on This Point.**

Ameritech's long holding time argument (Amer. Except., pp. 5-8) was properly rejected by the HEPAD, and Ameritech offers nothing new to support rejection of the HEPAD's conclusion on this issue.

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<sup>5</sup>Requiring carriers to pay inter-carrier compensation for the termination of ISP bound traffic is economically efficient. Indeed, because termination rates must be based upon their underlying costs, Ameritech should be economically indifferent as to whether it itself incurs the cost to terminate the call on its own network or whether it incurs that cost through a cost-based, inter-carrier compensation rate paid to Focal. Moreover, because Ameritech is required to pay, as well as receive, symmetrical compensation for local exchange traffic based upon its own costs, its payments to other carriers are an important check on Ameritech's cost studies. (Focal Ex. 2.0, pp. 20-21)

The evidence establishes, as the HEPAD concluded, that a ten minute call originated on the Ameritech network and directed to the Focal network travels exactly the same path, requires the use of exactly the same facilities, and generates exactly the same level of cost regardless of whether that call is dialed to a Focal local end user or to an ISP provider. Regardless of whether the originating customer dials either a Focal business customer or a Focal ISP customer, the call travels from the originating customer's premises to the Ameritech central office switch, which then routes the call to the Ameritech/Focal interconnection point and ultimately to the Focal switch. From the Focal switch the call is then transported to the residential customer or the ISP customer depending upon the number dialed by the Ameritech caller. Both calls use the same path and exactly the same equipment to reach their destinations. Most importantly, the costs to deliver calls made to residential customers and ISP customers are identical. Accordingly, the rates associated with recovering those costs should be identical.<sup>6</sup> (Focal Ex. 2.1, pp. 26-28)

The evidence shows that while ISP calls are longer on average than other types of local calls, this does not represent a fundamental difference that differentiates Internet-bound calls from all other local calls. For example, there are a number of non-voice, data applications that are completely local in nature and resemble almost exactly an Internet call, including calls to the Local Area Networks ("LANs") of large companies which their employees access from home by dialing a local telephone number. Such calls have the same duration as Internet-bound calls. Ameritech has presented evidence which shows *only* that the duration of ISP-bound calls is longer than the duration of average calls. It has *not* presented evidence which establishes anything about the underlying nature of an ISP-bound call, the costs such a call would generate

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<sup>6</sup>This explains why, contrary to Ameritech's contention at page 18, it is appropriate for the reciprocal compensation rate to be paid for *all* local traffic, including Internet-bound traffic.

on either Ameritech's or Focal's network, or why Internet-bound calls should be treated any differently than these other virtually identical "long" calls. (Focal Ex. 2.1, pp. 42-43)

While Ameritech's position depends upon the assumption that it costs more to carry traffic to ISPs, the Commission should be clear that Ameritech has *not* provided a cost study which establishes this contention.<sup>7</sup> Ameritech has simply used the cost data from its three-year old switching study (submitted in Docket 96-0486) and then altered the cost study outputs to account for a *single* revised criteria, the duration of ISP calls. In other words, Ameritech allocated per-call setup costs over a longer duration.<sup>8</sup> Thus, since the per-call setup costs were spread over a greater number of minutes, the per minute costs for an Internet-bound call decreased below that measured for an average length local call. Contrary to Ameritech's claim, this does not amount to a cost study and it proves nothing more than that spreading a number over more units decreases the per unit cost. (Focal Ex. 2.1, pp. 47-53)

Ameritech's analysis is neither complete nor scientifically valid. As a result, it should not be relied upon for purposes of understanding the actual costs of ISP-bound traffic in relation to other types of local traffic. At its worst, Ameritech's approach is self-serving and deceptive. Ameritech's analysis is flawed for the following additional reasons:

⇒ Ameritech's analysis erroneously assumes that there are two types of "local" traffic: traffic bound for the Internet and all other local traffic. Likewise, it assumes that only Internet-bound is longer in duration than the average. Obviously, neither of these assumptions is true. Ameritech's "study" does nothing to refute the fact that the costs

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<sup>7</sup>In fact, Ameritech has not provided such a study anywhere in its region. (Focal Ex. 2.0, p. 49)

<sup>8</sup>Switching costs, and the resultant allocation of those cost on a per minute of use basis, is far more complicated than Ameritech's analysis suggests. For example, BellCore's Switching Cost Information System, the econometric switching model upon which Ameritech bases its switching costs, includes thousands of user inputs, investment and network configuration assumptions and defined parameters. As such, there are a myriad inputs, criteria and assumptions that would need to be reviewed to determine the extent to which each assumption may be impacted by a decision to study a single subset of traffic (*i.e.*, Internet bound traffic) versus the universe of traffic (*i.e.*, all local traffic – the pool of traffic for which the models in Docket 96-0486 were run). (Focal Ex. 2.1, pp. 47-53)

associated with a 25 minute call are exactly the same regardless of whether that call is bound for the Internet or a live person. (Focal Ex. 2.1, p. 51)

⇒ Ameritech's analysis ignores characteristics of Internet bound traffic that might increase the per-minute-of-use costs associated with that traffic and, in combination with characteristics that lower its per minute costs, show that Internet-bound calls look very much like average calls. By failing to return to the actual cost study from which its switching costs are derived and appropriately changing all criteria that may be relevant to Internet-bound traffic, Ameritech has failed to provide reliable cost information. For example, ISP providers generally utilize Primary Rate ISDN ("PRI") services when receiving calls from the circuit switched network, which have a higher line/trunk concentration than typical voice-grade trunks. The evidence shows that it is likely that costs associated with local traffic utilizing strictly a PRI trunking arrangement will have higher, per-minute of use costs. Ameritech's analysis fails to consider this and all other potential cost differences. (Focal Ex. 2.1, pp. 51-52)

Focal was not required to prepare its own cost study. Instead, it relied upon the FCC's rule which allows CLECs to use the ILEC's cost as a proxy. The evidence shows that a complete cost analysis would likely show that Focal's cost of terminating traffic is higher than Ameritech's costs. This is because Ameritech's transport and termination costs were developed assuming the characteristics of Ameritech's mature, sometimes nearly fully loaded network. Obviously, the more a network is used, the lower the average per minute cost of transporting and delivering traffic (*i.e.*, the more minutes over which non-traffic sensitive costs can be recovered). On the other hand, while Focal uses similar switching platforms to those used by Ameritech, Focal's switches do not carry the same amount of traffic that Ameritech's switches do because Focal has recently entered the market. Thus, Focal's cost per minute of traffic transported and switched will undoubtedly be higher, at least initially, than Ameritech's cost upon which Focal's rates for reciprocal compensation is based. (Focal Ex. 2.0, p. 47)

This difference between CLECs and ILECs was recently recognized by the FCC:

We find that incumbent LECs retain material scale advantages with regard to provisioning and operating local circuit switches. Requesting carriers therefore will encounter generally greater direct costs per subscriber when provisioning

their own switches, particularly in the early stages of entry when requesting carriers may not have the large number of customers that is necessary to increase their switch utilization rates significantly. ....We find that, as a general proposition, requesting carriers will incur a materially greater cost when self-provisioning switching at low penetration levels. As a requesting carrier's switch utilization rates increase, the difference between the switching costs incurred by competitive and incumbent LECs decreases, but the impact of this difference does not become irrelevant in the impair analysis until incumbent LEC and competitor's switch utilization levels are more comparable. Market facts show that that competitors have made inroads into the local telecommunications markets, but they have garnered only between 2.6 percent to 5 percent of the market for switched telecommunications services. Accordingly, we find that as a general matter, requesting carriers have not gained sufficient market share to generate switch utilization rates and economies of scale comparable to the incumbent LEC, particularly to serve the mass market. (emphasis added)

*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket 96-96, FCC 99-238, (rel. Nov. 5, 1999) ¶ 260 ("*UNE Remand Order*").

Ameritech raises again the issue of the growth of Internet-bound traffic and the fact that Focal serves many ISPs in arguing for adoption of its incomplete and inadequate cost analysis. (Amer. Except., p. 7) What these facts demonstrate is that Focal has been more adept than Ameritech at meeting the growth in this transitionally competitive market. This is likely because many ISPs have been unable to reach agreement with incumbent LECs in areas such as pricing for high capacity lines, provisioning intervals, collocation of their equipment in ILEC central offices or even, in some circumstances, the ability to purchase service in sufficient quantity and in reasonable timeframes sufficient to meet their own end-user customer demands. CLECs have been successful in attracting a number of ISP customers because they have offered those customers innovations and reasonably priced advanced services at a level of customer care that ILECs like Ameritech were unable or unwilling to provide. Thus, ISPs have flocked to new entrants like Focal in increasing numbers. This is precisely how a competitive market is meant

to work. Carriers who are unwilling to meet the demands of their customers -- as ILECs have shown an unwillingness to work with ISPs -- lose those customers to carriers who are more accommodating. Likewise, carriers who provide customer focused services and supply the capacity required to meet their customers' demands are rewarded. Ameritech's dissatisfaction with the competitive process is not a basis for requiring Focal to complete calls made by Ameritech's customers to ISPs for free or at a drastically reduced rate. (Focal Ex. 2.0, pp. 22-25)

Ameritech tries to tie its proposal to Staff's proposal. (Amer. Except., pp. 14-15) Both suffer from the same deficiency, they are inconsistent with the law, the facts and sound policy. They are inconsistent with the law since they single out one category of local traffic for different reciprocal compensation rates. They are inconsistent with the facts since they are based on the conclusion that this traffic is somehow different from other local traffic, when it is not. They are inconsistent with sound policy for the reasons described above and since the Commission has never sanctioned partial and incomplete cost analyses such as the type which underlie both Staff's and Ameritech's proposals. Both proposals were properly rejected by the HEPAD.

**3. Ameritech's "One Switching Element" Argument and Staff's Proposal are Inconsistent with the Evidence and the FCC's Rule.**

Ameritech again argues for a rate of reciprocal compensation that would grossly under-compensate Focal for the costs it incurs to transport and terminate calls made by Ameritech's local customers. (Amer. Except., pp. 8-11) Similarly, Staff argues again for its adjusted end-office rate. (Staff Except, pp. 6-7) Ameritech and Staff raise no new arguments on exception. These arguments must again be rejected.

Ameritech claims that Focal must perform two switching functions in order to be entitled to the tandem rate for reciprocal compensation for Internet-bound traffic, and that any other

conclusion would be "preposterous." (Amer. Except., p. 8) Apparently the HEPAD is preposterous, since it rejected that contention. (HEPAD, p. 11)

In its Post-Hearing Brief, Focal described in detail the flaws in Staff's approach, which Ameritech relies on in its brief on exceptions. Many of those flaws bear repeating here:

- ⇒ While Mr. Phipps stated that many ISPs collocate in Focal's switching office (see Amer. Except., p. 8), the evidence shows that the vast majority of Focal's ISP customers are not collocated.<sup>9</sup>
- ⇒ The testimony of Mr. Barnicle referenced by Ameritech (Amer. Except., pp. 8-9) has been taken out of context and mischaracterized. While Mr. Barnicle stated it is cheaper to serve collocated ISPs, that reduction is reflected in the charges assessed the ISPs, not in the charges paid by Ameritech for transporting and terminating traffic to ISPs. Indeed, Mr. Barnicle went on in the cited portion of his testimony to discuss the cost of building and maintaining collocation space, which is not recovered through reciprocal compensation. (Tr. 113, 162)
- ⇒ Ameritech claims that Focal delivers traffic to collocated ISPs through use of local loops. (Amer. Except., p. 9) This contention is belied by the evidence. The same type of transport used to transport calls between central offices -- upon which Staff relied to conclude that Focal is entitled to the tandem rate for all other local traffic -- is used by Focal to transport calls to collocated ISPs, *i.e.*, a stand-alone, internal OC-48 SONET fiber transport network. These facilities are not loops. (Focal Ex. 2.1, pp. 11-12)
- ⇒ As stated previously, Focal was not required to prepare a cost study, and Ameritech's suggestion to the contrary (Amer. Except., p. 10) is inconsistent with the FCC's rule.
- ⇒ Mr. Starkey performed no "sleight of hand" in describing the facilities used by Focal to transport and terminate traffic, as Ameritech suggests. (Amer. Except., p. 10, fn. 5) The information on the cost of facilities used to provide these functions established that the cost of the facilities actually utilized by Focal is much greater than the cost of the simple cross connect which Mr. Phipps assumed. (*See* Focal Ex. 2.1, p. 12)
- ⇒ Ameritech contends that Focal performs only one switching function for calls delivered to both collocated and non-collocated ISPs. (Amer. Except., p. 11) This argument is the same argument -- also flatly rejected by Staff and the Hearing Examiners -- Ameritech made to show that that Focal is not entitled to the tandem rate for reciprocal compensation for all local traffic. The fallacies of that argument are addressed in Section II, below.

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<sup>9</sup>The actual number of collocated ISPs is proprietary, and is not being stated in this public document.



Finally, Ameritech contends that the HEPAD erred in stating that Ameritech should simply update its transport and termination rates. (Amer. Except., p. 19) That was no error. Because Ameritech is required to pay, as well as receive, symmetrical compensation for local exchange traffic based upon its own costs, its payments to other carriers are an important check on its cost studies. Unless Ameritech is required to pay the costs that are derived from its cost studies, it has every incentive to over-estimate those costs for purposes of raising barriers to competitive entry. By removing a large traffic volume category, such as ISP-bound traffic, from Ameritech's obligation to pay terminating costs, the Commission would be removing an important disciplining factor necessary to ensure that Ameritech's reported termination costs are reasonable. (Focal Ex. 2.0, pp. 20-21) Ameritech is arguing to remove this disciplining factor.

While Staff and Ameritech continue to contend that their reciprocal compensation proposals are appropriate, their arguments are contrary to the law and the facts, and were properly rejected by the HEPAD. Since they raise no new arguments on exception, their arguments must again be rejected.

**E. Ameritech's Contention that ISP-Bound Traffic Can be Segregated and Measured is Belied by the Evidence.**

Ameritech takes issue with the conclusion in the HEPAD that it is possible to segregate and measure Internet-bound traffic. (Amer. Except., pp. 19-20) Ameritech claims that even an erroneous number is better than none at all. (*Id.*) Ameritech's argument is ridiculous, and was properly rejected by the Hearing Examiners.

It makes no sense to establish a regulatory scheme that is not capable of being met. The un rebutted evidence establishes that it is not possible to separately track Internet-bound traffic. Moreover, it is not a matter within Focal's or Ameritech's control. Rather, as Focal's Chief Operating Officer indicated, the only entity that could actually know this information is the ISP.

(Tr. 161) However, since the same phone number is used to dial up the Internet as to access corporate LANs and other applications, there is no way of knowing whether a call is going to the Internet or to the corporate LAN. (Tr. 160-61) While Ameritech is willing to fudge it by 10% (p. 19), there is no basis in the record for determining how close an estimate would actually be. While inaccuracy may suit Ameritech's purposes, it certainly would not be legally sustainable or good policy.

**F. Ameritech's "Cost Causer" Argument is Specious and Was Properly Rejected by the Hearing Examiners.**

Ameritech rehashes its argument that ISPs are the cost causer and should be the ones to pay the costs recovered through reciprocal compensation. (Amer. Except., pp. 20-23) Staff and the HEPAD rejected this argument, likely since it does not pass the "straight face" test. Ameritech should be ashamed to raise it again.

The evidence is clear, when an Ameritech customer places a call to an ISP, it does so by using Ameritech's network, on which it generates those costs. If the ISP is served by Focal, Ameritech passes the costs of delivering the call to Focal. This is because Ameritech avoids the terminating switching costs it would have incurred had Focal not completed the call. (Focal Ex. 2.0, p. 31) It is therefore appropriate for Focal to look to Ameritech for cost recovery, and Staff agreed. Staff witness Phipps explained:

The fact that a great majority of traffic associated with a certain customer is inbound as opposed to outbound does not mean that Ameritech should not provide compensation for this traffic. The fact remains that Focal incurs costs for routing traffic that originates on Ameritech's network.

(Staff Ex. 2.0, p. 14)

Significantly, Ameritech does not dispute that Focal incurs costs on Ameritech's behalf when it delivers an Ameritech-originated call to an ISP customer. (Tr. 363-64) Nor does

Ameritech contend that Focal is not entitled to recover those costs. (Tr. 368) Instead, Ameritech argues that Focal should look to Focal's ISP customer for cost recovery, instead of Ameritech. (Amer. Ex. 1.0, pp. 8, 18-19; Tr. 366) This argument, which is based on Dr. Harris' testimony, is untenable for numerous reasons, including:

- ⇒ Dr. Harris was forced to admit that the vast majority of dial-up calls to Focal ISP customers are made by Ameritech customers and that, had the Ameritech customer not made the call in the first place, the costs would not be incurred. (Tr. 240) Dr. Harris was unable to explain in any way related to the provision of the telecommunications service why inbound calls into corporate LANs or automated banking systems are any different from calls to ISPs. Moreover, he could not explain why, when an Ameritech caller calls an ISP, the ISP is the cost-causer, but when the same customer calls his bank to conduct an electronic transaction, the bank is *not* the cost-causer. (See Tr. 240-47; 257-61) Yet Dr. Harris is not proposing that the costs of terminating local calls to these types of customers be recovered from the corporation providing the LAN or the bank. (Tr. 238) Dr. Harris' position can be characterized as nothing other than results-oriented.
- ⇒ Not only is Dr. Harris' theory internally inconsistent, but it is inconsistent with the well-established method of pricing telecommunications services. The costs of terminating local calls are recovered from the originating party through local usage rates.<sup>10</sup> (Focal Ex. 2, p. 39) In other words, the terminating party is not asked to pay the cost of terminating calls. (Tr. 367) Instead, it is the originator of the call that pays the termination costs. (*Id.*) This is also true for ISP customers. Neither has Ameritech ever asked this Commission to recover the costs of terminating local calls through basic local service rates from the terminating party. (Tr. 366) Thus, if Dr. Harris' theory is accepted and Ameritech's proposal in this case is adopted, Focal's ISP customers would be the only customers asked to pay the costs of calls to them. (Tr. 368)
- ⇒ Focal is effectively prohibited from recovering these costs from ISPs. Under the regulatory framework established by the FCC, enhanced service providers ("ESPs"), which includes ISPs, are treated as end users for ratemaking purposes. This means

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<sup>10</sup>Ameritech has claimed that it does not have the ability to recover these costs from its local customers who pay flat-rate pricing. Ameritech contends that because residential customers pay a flat rate for the usage they generate even though costs are often generated on a per minute of use basis, Ameritech may recover less revenue from those customers than the cost the customers generate. First, this problem is substantially mitigated here in Illinois where only Band A local calls are flat-rated. All other local calls are priced on a per minute structure. Second, this argument highlights a problem with Ameritech's local rate structure, not inter-carrier compensation for ISP-bound traffic. If Ameritech's position is adopted, it would require Focal to help subsidize Ameritech's local customers whose usage exceeds their flat-rated revenues. Such a result would be totally irrational. (Focal Ex. 2.0, pp. 35-37)

that ISPs do not pay access charges. Moreover, the FCC has required LECs to provide service to ESPs and ISPs from their local business service tariffs. *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order*, 3 FCC Rcd. 2631, ¶2 n.8, ¶20 n.53. As a result, LECs are prohibited from charging ISPs a rate higher than the rate they charge other local business customers. Therefore, even if Focal were to ignore the FCC's mandate and create a separate, higher-priced ISP rate which recovers termination costs, its ISPs would simply bypass that rate and buy service out of Focal's business tariffs. Moreover, while Dr. Harris admitted in cross-examination that Focal cannot currently recover these costs from ISPs through access charges, he acknowledged that ISPs must be allowed to obtain access to the public switched network through standard business tariffs. (Tr. 237-39)

**G. Ameritech's Proposals for Delay Should be Rejected.**

In a last ditch effort to salvage this issue, Ameritech offers several proposals for dealing with the matter of reciprocal compensation for Internet-bound calls, including: setting an artificially low rate, setting a rate that is subject to renegotiation by the parties through dispute resolution or initiating a generic proceeding. (Amer. Except., pp. 15-16) Since the Hearing Examiners correctly determined that the Commission has jurisdiction to establish the rates, terms and conditions of service for ISP traffic, the local nature of ISP-bound traffic is already well-settled, and the 1996 Act and the FCC's rules require that reciprocal compensation be paid on this traffic, there is no need for the Commission to consider, let alone adopt, any of Ameritech's proposals.

Neither should the Commission wait for a decision from the FCC on remand or in connection with its rulemaking proceedings. The *D.C. Circuit Decision* makes clear that ISP traffic must be treated like all other local traffic, the treatment of which is appropriately determined in this case.